

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement  
(916) 322-5662 322-5660 322-5901 322-6441

April 17, 1985

Michael B. Wilmar  
Nossaman, Guthner, Knox & Elliott  
695 Town Center Drive, Suite 1630  
Costa Mesa, CA 92626-1981

Re: A-85-088

Dear Mr. Wilmar:

Your letter requesting advice under the Political Reform Act has been referred to Kathryn Donovan, an attorney in the Legal Division of the Fair Political Practices Commission. If you have any questions about your advice request, you may contact this attorney directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or unless more information is needed to answer your request, you should expect a response within 21 working days.

Very truly yours,

*Barbara A. Milman*  
Barbara A. Milman  
General Counsel

BAM:plh

LAW OFFICES

NOSSAMAN, GUTHNER, KNOX & ELLIOTT

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511 SIXTEENTH STREET  
DENVER, CO 80202-4228  
(303) 595-9441

REFER TO FILE NUMBER

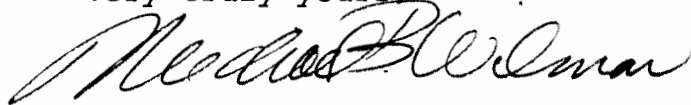
April 30, 1985

Ms. Kathryn Donovan  
Fair Political Practices Commission  
1100 K Street  
P. O. Box 807  
Sacramento, CA 95804

Dear Ms. Donovan:

I have received a copy of the letter dated April 29, 1985 from Linus Masouredis of the Attorney General's office regarding my opinion request of April 10, 1985. I do not necessarily agree with Mr. Masouredis's characterization of the legal or ethical issues. However, a lawyer rarely emerges from a debate over ethics with his or her reputation intact. I therefore wish to withdraw my opinion request.

Very truly yours,



Michael B. Wilmar of  
NOSSAMAN, GUTHNER, KNOX & ELLIOTT

MBW:jw  
1154H

cc: Alan R. Pendleton  
John T. Knox  
Sanford Skaggs  
Stephen L. Kotska  
Linus Masouredis

LAW OFFICES

NOSSAMAN, GUTHNER, KNOX & ELLIOTT

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April 10, 1985

REFER TO FILE NUMBER

Fair Political Practices Commission  
100 K Street Mall  
Sacramento, California 95814

Attention: Robert E. Leidigh

Dear Mr. Leidigh:

I am writing to request the opinion of the Fair Political Practices Commission with regard to whether or not under the circumstances outlined in this letter I am required to disqualify myself under Government Code Sections 87400 et seq.

Until June 30, 1983, I was the Executive Director of the San Francisco Bay Conservation and Development Commission ("BCDC"), a state agency. I held that position from July 1, 1979 through the above date. As Executive Director, I had final responsibility for the Commission staff, which during that period averaged approximately 30 individuals.

After I left state service, I joined the law firm of Nossaman, Guthner, Knox & Elliott in their Orange County office and have been in private practice since that time. Recently, the senior partner in the San Francisco office, John T. Knox, was contacted by the attorneys representing the Acme Landfill Company with regard to possibly assisting the company in resolving a matter which the company is currently litigating with BCDC. Mr. Knox has asked whether I would be in a position to assist him in this representation.

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My ability, or lack thereof, to do so obviously depends upon whether or not I would be disqualified under Government Code Sections 87400 et seq.

My recollection of the circumstances of my involvement with the matter in question prior to my departure from BCDC is as follows. The company proposed to fill an area in Contra Costa County for a solid waste disposal site. The site was located a substantial distance from San Francisco Bay and outside the Commission's jurisdiction, but within an area designated in the Commission's San Francisco Bay Plan as a "water-related industry priority use area." Although a permit from the Commission was not required for the project, a permit from the Army Corps of Engineers was. As a result, the project raised two legal issues for the Commission. The first was whether a so-called consistency certification was required under the Federal Coastal Zone Management Act. This act requires applicants for federal permits for projects "affecting the coastal zone" to obtain certifications from Coastal Zone Management agencies such as BCDC that their projects are consistent with the agency's Coastal Zone Management program. In this case, Acme has contended, and continues to contend, that its proposed project did not affect the coastal zone and therefore no consistency certification was required.

The Commission had faced the consistency question in a related, but slightly different context earlier. In response to the proposed disposal by the General Services Administration of Hamilton Air Force Base in Marin County, the Commission, acting on my recommendation, took the position that federal actions (which under the Coastal Zone Management Act do not include the issuance of federal permits) within priority use areas had to be consistent with the BCDC Coastal Zone Management Program. Furthermore, to enforce this requirement, the Commission instituted litigation. That litigation has now been settled.

With regard to the consistency issue on the Acme property, my recollection is that this matter was handled almost entirely by the Deputy Director of the Commission, Alan Pendleton, who is now Executive Director. I can specifically recall only two or three conversations that I had with anyone regarding the project. Two of these were with a Dale Sanders, who at that time I believe was acting as a consultant for the City of Martinez, which was then

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opposed to the expansion of the Acme site. My recollection of those conversations is that I indicated to him the Commission's past actions in similar matters (in particular Hamilton Air Force Base) and the staff's position. The other conversation was with Frank Boerger, a consultant for Acme. He asked for some guidance regarding the property. My response, as I recall, was that if at all possible the project should be carried out and finished off in a manner that left the site suitable for ultimate use for water-related industry. This would potentially allow the Commission to find that the use of the site for disposal of solid waste was an "interim use," which was permissible in a water-related industrial priority use area.

In discussing this matter further with Mr. Pendleton, he has advised me that I also signed at least three letters while Executive Director regarding the project. These letters are part of the administrative record in the litigation, and copies are attached. I believe that the letters were drafted by Mr. Pendleton, although I undoubtedly reviewed all three before they left the office. Nevertheless, I think it is also fair to say that the letters themselves only stated established Commission policy as applied to the specific property in question.

In addition, Mr. Pendleton believes that he discussed the project with me at least once. His recollection is that we discussed the Acme case in light of the Hamilton litigation, and I indicated that the latter left us no choice but to insist on compliance with the consistency provisions of the Coastal Zone Management Act. I do not recall the specifics of this particular discussion, but I think that for purposes of this opinion, the FPPC should assume that it took place. Furthermore, by copy of this letter I am asking Mr. Pendleton to provide you with his recollection of that conversation if he chooses to.

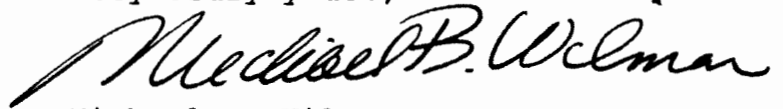
Sometime after my departure from BCDC, the Corps of Engineers issued a permit for the Acme project, but refused to require the company to submit a consistency certification to the Commission. The Commission filed suit to require Acme to comply with consistency provisions of the Act. I was not involved in any of the proceedings before the Commission.

NOSSAMAN, GUTHNER, KNOX & ELLIOTT

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I would appreciate your early response to this request.

Very truly yours,

A handwritten signature in cursive script, reading "Michael B. Wilmar". The signature is written in dark ink and is positioned above the typed name.

Michael B. Wilmar  
for NOSSAMAN, GUTHNER, KNOX & ELLIOTT

MBW/dlw  
Attachments

cc: Alan R. Pendleton, Esq.  
Linus Masouredis, Esq.  
John T. Knox, Esq.  
Sanford Skaggs, Esq.

## SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

30 VAN NESS AVENUE  
SAN FRANCISCO, CALIFORNIA 94102  
PHONE: 357-3686



July 14, 1983

Colonel Edward M. Lee  
District Engineer  
U. S. Army Corps of Engineers  
211 Main Street  
San Francisco, CA 94105

SUBJECT: Final EIR/EIS: Proposed Expansion of ACME Landfill Operations:  
PN13881E59; BCDC Inquiry File No. CC.MZ.8301 and DHB Site No. CC-27

Dear Colonel Lee:

Thank you for sending us the final EIR/EIS for the proposed expansion of the Acme Landfill. The Commission has not had an opportunity to review the document so these are comments of the staff only. Generally, we found complete and accurate information about the project, the site and the expected impacts in the EIR/EIS. However, we had also hoped to find information about the project's consistency or lack thereof with our management program for San Francisco Bay. We had met sometime ago with one of the consultants to the County to explain the consistency certification requirement and the type of information that the Commission would need to evaluate the certification. Apparently, the project sponsor decided to provide that information separately because, for the most part, it does not appear in the final EIS/EIR.

Consistency Certification Needed

The proposed landfill is an activity directly affecting both land and water within the coastal zone as described in the federally-approved management program for the San Francisco Bay segment of the California coastal zone. First, the landfill would occur within an area designated on San Francisco Bay Plan Map No. 17 as a future water-related industrial site. Suitable industrial sites for future needs are limited and the loss of this site may lead to fill in the Bay to provide land for water-related industry. Second, the use of areas near the Bay for landfill forecloses their use for Bay-related activities that need to be on or near the Bay. A sanitary landfill does not need to be in or near the Bay to function. Uses which can function in upland locations should be restricted from areas near the Bay so that the near shoreline will be available for uses that do need to be on or near the Bay. Third, as your report correctly describes, the proposed expansion site consists of marsh diked-off from tidal action that was formerly part of the natural Bay system. Despite the diking, the proposed expansion site still supports typical marsh plants and provides wildlife habitat. The loss of approximately 200 acres of marsh as a result of landfill will further reduce the total marsh habitat available in the Bay Area. Marsh has already

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been substantially reduced by past filling and every effort should be made to protect the remaining marsh. Although the Bay Plan recognizes that marsh areas may need to be filled for water-related industry, to lose marsh for non-water-related purposes is inconsistent with the Plan and the BCDC law as well as adversely affecting the wildlife resources of the Bay.

Since federal approval (the Corps' permit) is needed for the project, the project sponsor must certify that the proposed landfill complies with and will be conducted in a manner consistent with the management program BCDC administers. In this case, the policies and maps of the San Francisco Bay Plan and the provisions of the BCDC law (Government Code Sections 66600 et. seq.) are the relevant part of the program.

#### Difficult to Find Consistency

While only the Commission can decide whether to concur or not with a consistency certification, the staff believes the project poses several issues that make Commission concurrence unlikely. First, the landfill would preempt a water-related industrial site for a non-water-related industrial use. Second, the landfill use does not need to be on or near the Bay and can function well at an upland alternative site. Third, the landfill would destroy an area that now has some wildlife value and that potentially could have substantially greater wildlife value and does not propose suitable offsetting mitigation.

#### A. Preemption of Water-related Industrial Site

The landfill expansion would occur on a site designated in the Bay Plan for water-related industrial use. Landfill is not a water-related industrial use. The Bay Plan states that some industries that use water for transportation gain significant economic benefit from a waterfront location. These are defined as "water-related industries." Other industries may fall into that category because they use large volumes of water or because they provide support for a water-related industry. The Plan states the latter uses should be located in adjacent parcels that do not front on navigable water. The Acme landfill does not need a waterfront location because of transportation nor does it provide support for a water-related industry.

The effective removal of this site from the available inventory of water-related industrial land that would result if the landfill occurred may eventually lead to fill in the Bay to supply land for water-related industry. In this regard, the McAteer-Petris Act, in part, states:

"The Legislature further finds and declares that certain water-oriented land uses along the bay shoreline are essential to the public welfare of the bay area, and that such uses include ports, water-related industries,

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airports, wildlife refuges, water-oriented recreation and public assembly, desalinization plants and powerplants requiring large amounts of water for cooling purposes; that the San Francisco Bay Plan should make provision for adequate suitable locations for all such uses thereby minimizing the necessity for future fill to create new sites for such uses...."

The supply of water-related industrial land is already well below the projected need. The staff recently calculated the supply of land in the Bay area and found that 3909 acres remain. The survey excluded lands that were already developed, that had been removed from the supply by changes to local plans and zoning and that were too steep for development. The 730 acres of land within federal ownership were also excluded because an earlier BCDC study indicated that the land would not be released by the Navy before 2020.

The remaining amount of water-related industrial land is 7,091 acres short of the minimum 11,000 acres of land the Commission determined in 1978 should be reserved exclusively for water-related industry. Even if the need for industrial land declines sharply and the 730 acres within federal ownership are added to the inventory, a shortfall can be expected. ABAG's recently completed study of land needs in the Bay region also identified a shortage of available land in Contra Costa County by the year 2000. Although there is some question about the exact acreage that will be needed for industrial purposes by the year 2020, most other research indicates that there will be a significant shortage. While predictions of land needs may have been too optimistic in the past because they were made during an expanding economy, industrial expansion in Contra Costa County will likely increase, especially as off-shore lease activity increases.

As land supply decreases and industry needs increase, pressure to fill the Bay will increase. Failure to reserve land for industrial purposes now is unwise given the likely need for the land in the future.

Nor does it appear that the landfill can be considered an "interim" use allowable on water-related industrial sites. The San Francisco Bay Plan recognizes that land reserved for water-related industry will be developed over a period of years, therefore other uses may be allowed on reserved sites in the interim. The Commission has frequently approved such interim uses. Because the staff believes that the landfill can be found consistent with the Commission's management program only if it can be properly categorized as an interim use, the staff discussed this aspect of the project with the County's consultant. In this way we hoped to simplify the process, eliminate duplication of paperwork and reduce processing delays.

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The EIR/EIS, however, does not include adequate information to support an interim use classification for the landfill project. For example, one cannot tell whether the site can be used by industry after the landfill operations have been completed. There is little engineering information and no final grading scheme that illustrates how a water-related industry could utilize this site upon closing the landfill. A phasing plan for closure is also needed to indicate when the site could be utilized. Without this information it is difficult to determine the site's future availability for industry.

More importantly, even if the information were provided, staff research indicates that the likelihood of use of a former landfill site by industry in the Bay Area is remote. It may well be too costly to develop a landfill site for industry. In the one or two cases nationally where such sites have been used for industry after a landfill operation, it was necessary to construct large, costly platforms on piling over the fill in order to avoid the impacts of differential settlement and other problems associated with refuse landfills. The only industries that could afford the high construction costs associated with engineering solutions of this sort were located in heavily urbanized eastern cities where land costs were exceedingly high. The northern Contra Costa shoreline does not appear to have similar land costs and may not within the foreseeable future. Information on the costs of site development for industry at the proposed site should be provided so that it can be determined whether it is economically feasible for such an industrial use to occur after closure.

While it is unclear exactly how long the site will be devoted to landfill, the EIR/EIS states that the 200-acre site will have capacity until 2000 or for the next 17 years. This period may be too long to be considered interim in that the site may be needed for industry before that period expires. Additional information about projected industrial needs for land in Contra Costa County should be provided so that the Commission can determine when the site is likely to be needed for industry.

#### C. Landfills Near the Bay Not Consistent with the Bay Plan

The Bay Plan states that some uses of the shore take no advantage of the water as an asset and that some current uses abuse and despoil the water frontage. Policy 10 on page 31 of the Bay Plan states that development that does not use the Bay as an asset should not be allowed. Such development includes refuse disposal operations, unless they are part of an approved fill for a water-oriented use. As the landfill project does not propose any use for the fill other than disposal of refuse, it cannot be considered part of an approved fill.

Moreover, it appears that an alternative upland location exists for the landfill. The EIR/EIS amply discusses the need for a landfill site for eastern Contra Costa County and the difficulties of establishing a new site.

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The County and the landfill operator have expended a great deal of energy and resources in an effort to provide a cost effective and immediate waste disposal solution for the County citizens. However, development of the preferred site appears to have high environmental costs and the potential to create unemployment of county industrial workers if this 200 acres is lost from the water-related industrial land base. In addition, the EIR/EIS points out that even though this landfill could have capacity until 2000 that another new landfill will be required in the County by 1991. Acme itself has already purchased an option on a site to provide for future County landfill needs. Development of this alternative site, according to the EIR/EIS, will have fewer environmental impacts than expansion of the existing site.

D. Loss of Valuable Existing and Potential Habitat

The project is located in a diked bayland. The Diked Historic Baylands policies are not used for consistency determinations and also do not apply to areas designated for priority use. They are, however, to be used when the staff comments on Corps' Public Notices. Because some information in the EIR/EIS suggests that the site is not now suitable for water-related industrial use, the Corps should be aware of the applicable bayland policies.

If the County believes that the site cannot feasibly be used for industrial purposes, it will be necessary to seek an amendment to the Bay Plan to delete the present water-related industrial designation. However, the staff believes that such a request, unless accompanied by convincing information that the physical characteristics of the site or its location make it impossible to use it for water-related industry, would require a re-examination of water-related industrial sites and needs throughout the Bay Area. Such a planning project would be lengthy, time-consuming and expensive. The Commission would have to approve such a study as part of the planning program and funding would have to be provided as the present budget does not allow for such an extensive study. It should also be noted that the Commission completed a re-examination of this subject in 1978 when new findings and policies were adopted for water-related industry. At the time of the hearings on that study the County did not object to the designation of the present site for water-related industrial uses. For these reasons the Commission may be reluctant to undertake a new study of this matter in the near future. Assuming that such a study were done and the site was deleted from the industrial land inventory for the Bay Area, the Diked Historic Baylands policies would require further modification of the proposed landfill project.

The project would displace 200 acres of diked seasonal wetland. This type of habitat was found by the Commission in its study of diked historic bayland to be of particular value to the Bay migratory waterfowl and shorebirds. Birds take refuge in bayland sites such as this during high tides and storms. This site is also near to the tidal marshes of San Pablo Bay providing a juxtaposition of habitats that is essential to migratory waterfowl and shorebirds. Loss of the 200-acre site will reduce the area of wetlands that surround the Bay by a fairly large amount and it is possible that the populations of migratory birds could suffer as a result.

This site not only has existing habitat value but also has excellent potential for enhancement. It could be managed as a brackish marsh or returned to tidal action. The former can provide high value habitat for migratory species while the latter can increase the Bay surface area and provide food for Bay species. Either scheme can be integrated into a project that will provide additional flood control benefits for the County.

In addition, the Baylands policies state that if fill is placed that all wildlife values lost should be fully mitigated by acquisition, restoration, preservation and dedication of non-wetlands or suitable diked historic baylands or marshes or mudflats. A mitigation site of at least the acreage to be filled may be necessary in order to fully offset the loss of habitat, and it is possible that a larger site might be necessary if the habitat value of the site is determined to be extremely high by the relevant fish and wildlife agencies. The EIR/EIS does not indicate that the project sponsor is committed to a mitigation project that satisfies this policy.

#### Conclusion

The EIR/EIS carefully and fully discusses the environmental effects of expanding the landfill into the proposed site. We believe the document meets the requirements of the California Environmental Quality Act and the National Environmental Policy Act. The included information, however, suggests that the expansion will have unavoidable adverse impacts and involves a use that does not need to be near the Bay. While the document includes much information that the Commission will need when the consistency certification is submitted, certain information is lacking as discussed above. We had hoped that this information would be included in the document to save the project sponsor, the County and the Corps the need of preparing separate consistency information.

We note that a consistency certification has not been submitted by the project sponsor and remind the concerned agencies and the company that one must be submitted and acted upon by the Commission before a Corps' permit may be issued.

If you have further questions regarding this matter, please contact Alan R. Pendleton, the Executive Director-designate of the Commission.

Sincerely,



MICHAEL B. WILMAR  
Executive Director

MBW/st

cc: Anthony Dehaesus, Contra Costa County  
Acme Landfill Company  
Dale Sanders, City of Martinez  
Bill Brah, Office of Coastal Resource Management  
Tom Powers, Supervisor Contra Costa County  
Angelo Siracusa, Bay Area Council

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## SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

30 VAN NESS AVENUE  
SAN FRANCISCO, CALIFORNIA 94102  
PHONE: 557-3686



August 12, 1981

Mr. Scott Miner  
San Francisco District Environmental Branch  
U. S. Army Corps of Engineers  
Department of the Army  
211 Main Street  
San Francisco, California 94105

SUBJECT: Draft Environmental Impact Report for Acme Fill Corporation,  
SCH #81072109

Gentlemen:

We have received your notice regarding the preparation of a draft EIR for the Acme Fill Corporation's project in Martinez, California. On July 24, 1981 the staff wrote to the County of Contra Costa regarding this same project. Our letter to them is appended for your information.

In addition to the comments made to the County we would like to inform you that the Acme Corporation's site, although outside the Commission's jurisdiction is within an area that is designated as water-related industry on Bay Plan Map No. 17. Priority use areas are considered to be part of the "coastal zone" under the Coastal Zone Management Act of 1972 and thus the Commission must find that any project within that area and requiring a federal permit is consistent with the BCDC Plan and policies. The policies on water-related industry and marshes and mudflats are the policies with which this project must be consistent. The staff does not believe that this project is a water-related industry since it does not receive significant benefit from fronting on navigable waters and it does not use water for transportation. Although the Bay Plan policies state interim uses may be placed in water-related priority use areas, it is not clear whether industrial uses could be placed on this fill after the landfill operation is completed.

In addition the staff does not believe that filling of the wetlands on this site would provide a substantial public benefit and there is a reasonable alternative upland location for this project. For these two reasons the staff believes this project may not be consistent with the BCDC management program and that the Commission would have difficulty in finding it consistent.

CC460

Mr. Scott Miner  
August 12, 1981  
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Since the Corps believes that the project is not water dependent and it would require fill in a wetland, the staff believes that the applicant should demonstrate clearly that there are no alternative sites available for this use. The staff believes that there are sites in Contra Costa County that could be used for this purpose and although they are not controlled by this applicant would be practical for landfill because they could be reasonably obtained and utilized for this use without requiring fill in a wetland. The draft EIR should fully explore alternative sites for this project.

Very truly yours,



MICHAEL B. WILMAR  
Executive Director

Enclosure

MBW/NW/vw

cc: State Clearinghouse  
Robert Batha  
Contra Costa County

00461



September 27, 1982

Mr. Scott Miner  
San Francisco District Engineer  
U. S. Army Corps of Engineers  
Department of the Army  
211 Main Street  
San Francisco, California 94105

SUBJECT: Draft Environmental Impact Report/Statement  
Public Notice No. 13881E59 Acme Landfill Expansion  
BCDC Inquiry File No. MC.MC.7415.10 + 7205.1

Dear Mr. Miner:

The staff has reviewed the public notice and environmental impact report/statement (EIR/EIS) for the Acme Landfill expansion. Although the project will occur on land that is outside the Commission's permit jurisdiction, as noted on page 25 of the EIR/EIS, it is within an area designated water-related industry in the San Francisco Bay Plan. Because the staff believes that the project may affect land and water use within the Commission's jurisdiction, it will require Commission concurrence in a consistency certification under the Coastal Zone Management Act of 1972 prior to issuance of the Corps permit. To date, a consistency certification has not been submitted. Furthermore, from the information in the EIR/EIS and public notice, it is not clear whether a certification can be issued for this project because the use proposed could not be considered a water-related industry.

As you may know, the priority use areas in the Bay Plan were designated in order to reduce future pressure to fill the Bay by reserving especially desirable shoreline sites for uses needing a waterfront location. These uses include water-related industry. If these sites are allowed to be preempted for other purposes, it could eventually mean that fill would be required in the Bay to provide the back up or storage land that is essential to water-related industrial uses.

We note that the draft EIR/EIS states it is doubtful that the large amount of undeveloped area in Contra Costa County designated for water-related industry will be needed for that use in the future. However, the Bay Plan designations stem from a study that identified land use needs to the year 2020, particularly land needed for water-related industry to reduce the need for future fill in the Bay. The EIR/EIS presents no facts to support the contrary opinion regarding land use needs.

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Secondly, no information has been provided in the EIR/EIS that would allow the Commission to determine that this is an interim use and that the site could eventually be used for water-related industry after the sanitary landfill operation is complete. In order for the Commission to make such a determination, it would need engineering data that would assure that it was technically feasible to construct a water-related use on the site and that it would be economically feasible for a water-related use to locate at the Acme site after the fill was completed.

With this letter we are also notifying the applicant that a consistency certification will be needed before the Corps issues a permit and that it is unlikely that the Commission could issue the certification unless the proposed use will not preclude future use of the site for water-related industry.

Very truly yours,

  
MICHAEL B. WILMAR  
Executive Director

MBW/lg

cc: Frank Boerger  
Contra Costa County  
City of Martinez

00394



## SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

30 VAN NESS AVENUE  
SAN FRANCISCO, CALIFORNIA 94102  
PHONE: 557-3686



July 14, 1983

Colonel Edward M. Lee  
District Engineer  
U. S. Army Corps of Engineers  
211 Main Street  
San Francisco, CA 94105

SUBJECT: Final EIR/EIS: Proposed Expansion of ACME Landfill Operations:  
PN13881E59; BCDC Inquiry File No. CC.MZ.8301 and DHB Site No. CC-27

Dear Colonel Lee:

Thank you for sending us the final EIR/EIS for the proposed expansion of the Acme Landfill. The Commission has not had an opportunity to review the document so these are comments of the staff only. Generally, we found complete and accurate information about the project, the site and the expected impacts in the EIR/EIS. However, we had also hoped to find information about the project's consistency or lack thereof with our management program for San Francisco Bay. We had met sometime ago with one of the consultants to the County to explain the consistency certification requirement and the type of information that the Commission would need to evaluate the certification. Apparently, the project sponsor decided to provide that information separately because, for the most part, it does not appear in the final EIS/EIR.

Consistency Certification Needed

The proposed landfill is an activity directly affecting both land and water within the coastal zone as described in the federally-approved management program for the San Francisco Bay segment of the California coastal zone. First, the landfill would occur within an area designated on San Francisco Bay Plan Map No. 17 as a future water-related industrial site. Suitable industrial sites for future needs are limited and the loss of this site may lead to fill in the Bay to provide land for water-related industry. Second, the use of areas near the Bay for landfill forecloses their use for Bay-related activities that need to be on or near the Bay. A sanitary landfill does not need to be in or near the Bay to function. Uses which can function in upland locations should be restricted from areas near the Bay so that the near shoreline will be available for uses that do need to be on or near the Bay. Third, as your report correctly describes, the proposed expansion site consists of marsh diked-off from tidal action that was formerly part of the natural Bay system. Despite the diking, the proposed expansion site still supports typical marsh plants and provides wildlife habitat. The loss of approximately 200 acres of marsh as a result of landfill will further reduce the total marsh habitat available in the Bay Area. Marsh has already

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been substantially reduced by past filling and every effort should be made to protect the remaining marsh. Although the Bay Plan recognizes that marsh areas may need to be filled for water-related industry, to lose marsh for non-water-related purposes is inconsistent with the Plan and the BCDC law as well as adversely affecting the wildlife resources of the Bay.

Since federal approval (the Corps' permit) is needed for the project, the project sponsor must certify that the proposed landfill complies with and will be conducted in a manner consistent with the management program BCDC administers. In this case, the policies and maps of the San Francisco Bay Plan and the provisions of the BCDC law (Government Code Sections 66600 et. seq.) are the relevant part of the program.

#### Difficult to Find Consistency

While only the Commission can decide whether to concur or not with a consistency certification, the staff believes the project poses several issues that make Commission concurrence unlikely. First, the landfill would preempt a water-related industrial site for a non-water-related industrial use. Second, the landfill use does not need to be on or near the Bay and can function well at an upland alternative site. Third, the landfill would destroy an area that now has some wildlife value and that potentially could have substantially greater wildlife value and does not propose suitable offsetting mitigation.

#### A. Preemption of Water-related Industrial Site

The landfill expansion would occur on a site designated in the Bay Plan for water-related industrial use. Landfill is not a water-related industrial use. The Bay Plan states that some industries that use water for transportation gain significant economic benefit from a waterfront location. These are defined as "water-related industries." Other industries may fall into that category because they use large volumes of water or because they provide support for a water-related industry. The Plan states the latter uses should be located in adjacent parcels that do not front on navigable water. The Acme landfill does not need a waterfront location because of transportation nor does it provide support for a water-related industry.

The effective removal of this site from the available inventory of water-related industrial land that would result if the landfill occurred may eventually lead to fill in the Bay to supply land for water-related industry. In this regard, the McAteer-Petris Act, in part, states:

"The Legislature further finds and declares that certain water-oriented land uses along the bay shoreline are essential to the public welfare of the bay area, and that such uses include ports, water-related industries,

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airports, wildlife refuges, water-oriented recreation and public assembly, desalinization plants and powerplants requiring large amounts of water for cooling purposes; that the San Francisco Bay Plan should make provision for adequate suitable locations for all such uses thereby minimizing the necessity for future fill to create new sites for such uses...."

The supply of water-related industrial land is already well below the projected need. The staff recently calculated the supply of land in the Bay area and found that 3909 acres remain. The survey excluded lands that were already developed, that had been removed from the supply by changes to local plans and zoning and that were too steep for development. The 730 acres of land within federal ownership were also excluded because an earlier BCDC study indicated that the land would not be released by the Navy before 2020.

The remaining amount of water-related industrial land is 7,091 acres short of the minimum 11,000 acres of land the Commission determined in 1978 should be reserved exclusively for water-related industry. Even if the need for industrial land declines sharply and the 730 acres within federal ownership are added to the inventory, a shortfall can be expected. ABAG's recently completed study of land needs in the Bay region also identified a shortage of available land in Contra Costa County by the year 2000. Although there is some question about the exact acreage that will be needed for industrial purposes by the year 2020, most other research indicates that there will be a significant shortage. While predictions of land needs may have been too optimistic in the past because they were made during an expanding economy, industrial expansion in Contra Costa County will likely increase, especially as off-shore lease activity increases.

As land supply decreases and industry needs increase, pressure to fill the Bay will increase. Failure to reserve land for industrial purposes now is unwise given the likely need for the land in the future.

Nor does it appear that the landfill can be considered an "interim" use allowable on water-related industrial sites. The San Francisco Bay Plan recognizes that land reserved for water-related industry will be developed over a period of years, therefore other uses may be allowed on reserved sites in the interim. The Commission has frequently approved such interim uses. Because the staff believes that the landfill can be found consistent with the Commission's management program only if it can be properly categorized as an interim use, the staff discussed this aspect of the project with the County's consultant. In this way we hoped to simplify the process, eliminate duplication of paperwork and reduce processing delays.

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The EIR/EIS, however, does not include adequate information to support an interim use classification for the landfill project. For example, one cannot tell whether the site can be used by industry after the landfill operations have been completed. There is little engineering information and no final grading scheme that illustrates how a water-related industry could utilize this site upon closing the landfill. A phasing plan for closure is also needed to indicate when the site could be utilized. Without this information it is difficult to determine the site's future availability for industry.

More importantly, even if the information were provided, staff research indicates that the likelihood of use of a former landfill site by industry in the Bay Area is remote. It may well be too costly to develop a landfill site for industry. In the one or two cases nationally where such sites have been used for industry after a landfill operation, it was necessary to construct large, costly platforms on piling over the fill in order to avoid the impacts of differential settlement and other problems associated with refuse landfills. The only industries that could afford the high construction costs associated with engineering solutions of this sort were located in heavily urbanized eastern cities where land costs were exceedingly high. The northern Contra Costa shoreline does not appear to have similar land costs and may not within the foreseeable future. Information on the costs of site development for industry at the proposed site should be provided so that it can be determined whether it is economically feasible for such an industrial use to occur after closure.

While it is unclear exactly how long the site will be devoted to landfill, the EIR/EIS states that the 200-acre site will have capacity until 2000 or for the next 17 years. This period may be too long to be considered interim in that the site may be needed for industry before that period expires. Additional information about projected industrial needs for land in Contra Costa County should be provided so that the Commission can determine when the site is likely to be needed for industry.

#### C. Landfills Near the Bay Not Consistent with the Bay Plan

The Bay Plan states that some uses of the shore take no advantage of the water as an asset and that some current uses abuse and despoil the water frontage. Policy 10 on page 31 of the Bay Plan states that development that does not use the Bay as an asset should not be allowed. Such development includes refuse disposal operations, unless they are part of an approved fill for a water-oriented use. As the landfill project does not propose any use for the fill other than disposal of refuse, it cannot be considered part of an approved fill.

Moreover, it appears that an alternative upland location exists for the landfill. The EIR/EIS amply discusses the need for a landfill site for eastern Contra Costa County and the difficulties of establishing a new site.

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The County and the landfill operator have expended a great deal of energy and resources in an effort to provide a cost effective and immediate waste disposal solution for the County citizens. However, development of the preferred site appears to have high environmental costs and the potential to create unemployment of county industrial workers if this 200 acres is lost from the water-related industrial land base. In addition, the EIR/EIS points out that even though this landfill could have capacity until 2000 that another new landfill will be required in the County by 1991. Acme itself has already purchased an option on a site to provide for future County landfill needs. Development of this alternative site, according to the EIR/EIS, will have fewer environmental impacts than expansion of the existing site.

D. Loss of Valuable Existing and Potential Habitat

The project is located in a diked bayland. The Diked Historic Baylands policies are not used for consistency determinations and also do not apply to areas designated for priority use. They are, however, to be used when the staff comments on Corps' Public Notices. Because some information in the EIR/EIS suggests that the site is not now suitable for water-related industrial use, the Corps should be aware of the applicable bayland policies.

If the County believes that the site cannot feasibly be used for industrial purposes, it will be necessary to seek an amendment to the Bay Plan to delete the present water-related industrial designation. However, the staff believes that such a request, unless accompanied by convincing information that the physical characteristics of the site or its location make it impossible to use it for water-related industry, would require a re-examination of water-related industrial sites and needs throughout the Bay Area. Such a planning project would be lengthy, time-consuming and expensive. The Commission would have to approve such a study as part of the planning program and funding would have to be provided as the present budget does not allow for such an extensive study. It should also be noted that the Commission completed a re-examination of this subject in 1978 when new findings and policies were adopted for water-related industry. At the time of the hearings on that study the County did not object to the designation of the present site for water-related industrial uses. For these reasons the Commission may be reluctant to undertake a new study of this matter in the near future. Assuming that such a study were done and the site was deleted from the industrial land inventory for the Bay Area, the Diked Historic Baylands policies would require further modification of the proposed landfill project.

The project would displace 200 acres of diked seasonal wetland. This type of habitat was found by the Commission in its study of diked historic bayland to be of particular value to the Bay migratory waterfowl and shorebirds. Birds take refuge in bayland sites such as this during high tides and storms. This site is also near to the tidal marshes of San Pablo Bay providing a juxtaposition of habitats that is essential to migratory waterfowl and shorebirds. Loss of the 200-acre site will reduce the area of wetlands that surround the Bay by a fairly large amount and it is possible that the populations of migratory birds could suffer as a result.

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This site not only has existing habitat value but also has excellent potential for enhancement. It could be managed as a brackish marsh or returned to tidal action. The former can provide high value habitat for migratory species while the latter can increase the Bay surface area and provide food for Bay species. Either scheme can be integrated into a project that will provide additional flood control benefits for the County.

In addition, the Baylands policies state that if fill is placed that all wildlife values lost should be fully mitigated by acquisition, restoration, preservation and dedication of non-wetlands or suitable diked historic baylands or marshes or mudflats. A mitigation site of at least the acreage to be filled may be necessary in order to fully offset the loss of habitat, and it is possible that a larger site might be necessary if the habitat value of the site is determined to be extremely high by the relevant fish and wildlife agencies. The EIR/EIS does not indicate that the project sponsor is committed to a mitigation project that satisfies this policy.

#### Conclusion

The EIR/EIS carefully and fully discusses the environmental effects of expanding the landfill into the proposed site. We believe the document meets the requirements of the California Environmental Quality Act and the National Environmental Policy Act. The included information, however, suggests that the expansion will have unavoidable adverse impacts and involves a use that does not need to be near the Bay. While the document includes much information that the Commission will need when the consistency certification is submitted, certain information is lacking as discussed above. We had hoped that this information would be included in the document to save the project sponsor, the County and the Corps the need of preparing separate consistency information.

We note that a consistency certification has not been submitted by the project sponsor and remind the concerned agencies and the company that one must be submitted and acted upon by the Commission before a Corps' permit may be issued.

If you have further questions regarding this matter, please contact Alan R. Pendleton, the Executive Director-designate of the Commission.

Sincerely,



MICHAEL B. WILMAR  
Executive Director

MBW/st

cc: Anthony Dehaesus, Contra Costa County  
Acme Landfill Company  
Dale Sanders, City of Martinez  
Bill Brah, Office of Coastal Resource Management  
Tom Powers, Supervisor Contra Costa County  
Angelo Siracusa, Bay Area Council

1 00389



September 27, 1982

Mr. Scott Miner  
San Francisco District Engineer  
U. S. Army Corps of Engineers  
Department of the Army  
211 Main Street  
San Francisco, California 94105

SUBJECT: Draft Environmental Impact Report/Statement  
Public Notice No. 13881E59 Acme Landfill Expansion  
BCDC Inquiry File No. MC.MC.7415.10 + 7305.1

Dear Mr. Miner:

The staff has reviewed the public notice and environmental impact report/statement (EIR/EIS) for the Acme Landfill expansion. Although the project will occur on land that is outside the Commission's permit jurisdiction, as noted on page 25 of the EIR/EIS, it is within an area designated water-related industry in the San Francisco Bay Plan. Because the staff believes that the project may affect land and water use within the Commission's jurisdiction, it will require Commission concurrence in a consistency certification under the Coastal Zone Management Act of 1972 prior to issuance of the Corps permit. To date, a consistency certification has not been submitted. Furthermore, from the information in the EIR/EIS and public notice, it is not clear whether a certification can be issued for this project because the use proposed could not be considered a water-related industry.

As you may know, the priority use areas in the Bay Plan were designated in order to reduce future pressure to fill the Bay by reserving especially desirable shoreline sites for uses needing a waterfront location. These uses include water-related industry. If these sites are allowed to be preempted for other purposes, it could eventually mean that fill would be required in the Bay to provide the back up or storage land that is essential to water-related industrial uses.

We note that the draft EIR/EIS states it is doubtful that the large amount of undeveloped area in Contra Costa County designated for water-related industry will be needed for that use in the future. However, the Bay Plan designations stem from a study that identified land use needs to the year 2020, particularly land needed for water-related industry to reduce the need for future fill in the Bay. The EIR/EIS presents no facts to support the contrary opinion regarding land use needs.

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Secondly, no information has been provided in the EIR/EIS that would allow the Commission to determine that this is an interim use and that the site could eventually be used for water-related industry after the sanitary landfill operation is complete. In order for the Commission to make such a determination, it would need engineering data that would assure that it was technically feasible to construct a water-related use on the site and that it would be economically feasible for a water-related use to locate at the Acme site after the fill was completed.

With this letter we are also notifying the applicant that a consistency certification will be needed before the Corps issues a permit and that it is unlikely that the Commission could issue the certification unless the proposed use will not preclude future use of the site for water-related industry.

Very truly yours,

  
MICHAEL B. WILMAR  
Executive Director

MBW/lg

cc: Frank Boerger  
Contra Costa County  
City of Martinez

00394



## SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

30 VAN NESS AVENUE  
SAN FRANCISCO, CALIFORNIA 94102  
PHONE: 557-3686



August 12, 1981

Mr. Scott Miner  
San Francisco District Environmental Branch  
U. S. Army Corps of Engineers  
Department of the Army  
211 Main Street  
San Francisco, California 94105

SUBJECT: Draft Environmental Impact Report for Acme Fill Corporation,  
SCH #81072109

Gentlemen:

We have received your notice regarding the preparation of a draft EIR for the Acme Fill Corporation's project in Martinez, California. On July 24, 1981 the staff wrote to the County of Contra Costa regarding this same project. Our letter to them is appended for your information.

In addition to the comments made to the County we would like to inform you that the Acme Corporation's site, although outside the Commission's jurisdiction is within an area that is designated as water-related industry on Bay Plan Map No. 17. Priority use areas are considered to be part of the "coastal zone" under the Coastal Zone Management Act of 1972 and thus the Commission must find that any project within that area and requiring a federal permit is consistent with the BCDC Plan and policies. The policies on water-related industry and marshes and mudflats are the policies with which this project must be consistent. The staff does not believe that this project is a water-related industry since it does not receive significant benefit from fronting on navigable waters and it does not use water for transportation. Although the Bay Plan policies state interim uses may be placed in water-related priority use areas, it is not clear whether industrial uses could be placed on this fill after the landfill operation is completed.

In addition the staff does not believe that filling of the wetlands on this site would provide a substantial public benefit and there is a reasonable alternative upland location for this project. For these two reasons the staff believes this project may not be consistent with the BCDC management program and that the Commission would have difficulty in finding it consistent.

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Mr. Scott Miner  
August 12, 1981  
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Since the Corps believes that the project is not water dependent and it would require fill in a wetland, the staff believes that the applicant should demonstrate clearly that there are no alternative sites available for this use. The staff believes that there are sites in Contra Costa County that could be used for this purpose and although they are not controlled by this applicant would be practical for landfill because they could be reasonably obtained and utilized for this use without requiring fill in a wetland. The draft EIR should fully explore alternative sites for this project.

Very truly yours,



MICHAEL B. WILMAR  
Executive Director

Enclosure

MBW/NW/vw

cc: State Clearinghouse  
Robert Batha  
Contra Costa County

00461

JOHN K. VAN DE KAMP  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



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(415) 557-2544

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April 29, 1985

Kathryn Donovan  
Fair Political Practices Commission  
1100 K Street  
P.O. Box 807  
Sacramento, CA 95804

Re: Michael B. Wilmar Opinion Request

Dear Ms. Donovan:

We have received a copy of Mr. Michael Wilmar's April 10, 1985 letter to Robert Leidigh of the Fair Political Practices Commission requesting an opinion as to whether Mr. Wilmar is disqualified under Government Code § 87400 et seq. from representing Acme Fill Corporation (Acme) in pending litigation between Acme and Mr. Wilmar's previous employer, the San Francisco Bay Conservation and Development Commission (BCDC). Because we believe that it is important for you to be apprised of the nature of the litigation and Mr. Wilmar's past activities, we will briefly describe the circumstances of the litigation and Mr. Wilmar's involvement with the matter while he was Executive Director of BCDC.

In addition to regulating developments and fill in and around San Francisco Bay under the McAteer-Petris Act, Government Code § 66600 et seq., BCDC also exercises what is known as consistency review under the federal Coastal Zone Management Act, (CZMA) 16 U.S.C. § 1451 et seq. Under the CZMA, state land use agencies may adopt coastal management programs which are reviewed and approved by the federal government. After a coastal management program has been federally-approved, the state agency may review federally-conducted activities, and private activities and projects for which a federal permit is required, which affect land and water uses in the coastal zone, to ensure that such activities will be consistent with the adopted coastal management program. The state agency may either concur that a proposed activity will be consistent with the management program, or it may object, in which case a federal agency may not issue a federal permit for the private activity. See 16 U.S.C. § 1456(c). This review of federal and private activities under the CZMA is commonly known as consistency review.

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BCDC has a federally-approved coastal management program, and BCDC exercises consistency review in the San Francisco Bay region of the coastal zone.

Acme applied for a U.S. Army Corps of Engineers (Corps) permit for a waste disposal and land fill expansion in Contra Costa County when Mr. Wilmar was Executive Director of BCDC. In various letters signed by Mr. Wilmar as Executive Director, he advised Acme and the Corps of BCDC staff's determination that the Corps permit application was subject to consistency review by BCDC, and that Acme's proposed land fill expansion did not appear to be consistent with BCDC's coastal management program. Copies of these letters, including Mr. Wilmar's July 14, 1983 letter, are enclosed.

Acme and the Corps disputed BCDC's jurisdiction to review the land fill expansion for consistency, and disputed BCDC staff's view that the land fill expansion affected coastal land and water uses and was inconsistent with BCDC's management program.

BCDC formally reviewed and objected to the Corps permit in 1984. The Corps subsequently issued a permit for the land fill expansion notwithstanding BCDC's consistency objection.

Acme has sued BCDC in state court challenging BCDC's consistency objection (Acme Fill Corp. v. San Francisco Bay Conservation and Development Commission No. 258242 (Sup. Ct. Contra Costa)). A copy of Acme's petition in this state court action is enclosed. Acme has also instituted an appeal to the Secretary of Commerce, pursuant to the provision for such an appeal in the CZMA, seeking to overturn BCDC's consistency objection. BCDC has sued the Corps and Acme in federal court, contending that the Corps improperly issued a permit to Acme in view of BCDC's consistency objection (State ex rel. BCDC v. Lee, et al., No. C-85-1343-MHP (N.D. Cal.)). A copy of BCDC's complaint and Acme's answer in this federal court action are enclosed.

Given this background, a few points should be noted. First, Mr. Wilmar's July 14, 1983 letter demonstrates that Mr. Wilmar was representing BCDC and stating the agency's position on the key issues which are the very subject of the pending litigation and which are specifically controverted by Acme,

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the party whom Mr. Wilmar now seeks to represent. Thus, Mr. Wilmar's July 14, 1983 letter states 1) that BCDC has consistency review jurisdiction over Acme's project; 2) that Acme's proposed activity affects land and water uses in the coastal zone; 3) that Acme's activity is not consistent with the BCDC management program and the Bay Plan; 4) that Acme's land fill is not a water-related industrial use as defined in the Bay Plan; and 5) that Acme's landfill will preclude future use of the landfill site for water-related industry.

Acme's answer to BCDC's federal court complaint 1) denies that Acme's Corps permit application is subject to consistency review (answer, para. 7); 2) denies that Acme's activity affects land and water uses in the coastal zone (answer, para. 10); 3) denies that Acme's land fill is inconsistent with BCDC's management program and the Bay Plan (answer, para. 10); 4) denies that Acme's land fill is not a water-related industrial use (answer, para. 10); and 5) denies that Acme's landfill will preclude future use of the site for water-related industry (answer, para. 10).

Acme's state court petition for a writ of mandate similarly 1) challenges BCDC jurisdiction to review Acme's project for consistency (petition, 3rd and 4th causes of action); 2) challenges BCDC's determination that the activity affects coastal land and water uses (petition, 3rd, 4th and 9th causes of action); 3) challenges BCDC's determination that the land fill is not consistent with the management program and Bay Plan (petition, 5th, 6th, and 7th causes of action); 4) challenges BCDC's finding that the land fill is not a water-related industrial use (petition, 6th cause of action); and 5) challenges BCDC's determination that the land fill will preclude further use of the site for water-related industry (petition, 10th cause of action).

Moreover, in both the federal and state court litigation, Acme contests the timeliness and sufficiency of BCDC's notice of intent to exercise consistency review (see answer, para. 14; petition, 1st and 2nd causes of action). BCDC intends to rely, and has relied in that litigation on the very letters that Mr. Wilmar wrote and the actions that he took as Executive Director of BCDC, to rebut Acme's notice claim. In short, were Mr. Wilmar to represent Acme in the pending

litigation, he would necessarily be taking a position adverse to that of BCDC on the very matters in which he represented and specifically acted on behalf of BCDC.

Second, our concern in this matter stems not from the fact that Mr. Wilmar was previously BCDC's Executive Director, or that Mr. Wilmar is familiar with BCDC policies, or that he was involved (as he notes in his letter) in the Hamilton Air Force Base litigation when he was at BCDC. Rather, our concern is that Mr. Wilmar was specifically involved in the Acme consistency proceeding when he was Executive Director, and that the litigation in which he seeks to represent Acme involves the same parties, transaction, facts, and issues as those in the BCDC proceeding.

Third, we believe that Mr. Wilmar personally and substantially participated in the Acme matter when he was BCDC's Executive Director. Apart from the evidence that his letters provide, we understand that Mr. Wilmar was involved at an early date in the Acme matter after it came to BCDC's attention; that Mr. Wilmar and BCDC staff were aware at an early point of the likelihood of litigation in the matter; that there were various discussions between Mr. Wilmar and the BCDC staff regarding what position BCDC would take on the matter; that these discussions included discussion of the strengths and weaknesses of BCDC's position in the event of litigation, and similarities and differences with other positions on consistency review that BCDC had taken; and that Mr. Wilmar subsequently assigned the Acme matter to Alan Pendleton after Mr. Wilmar determined to leave BCDC. Mr. Wilmar's 6-page single space letter of July 14, 1983 is not simply a form letter notifying someone in a ministerial fashion to apply for a permit. Instead, it obviously evidences that this highly controversial matter had been carefully reviewed and analyzed internally, and Mr. Wilmar was involved in and privy to these internal discussions. In these circumstances, we believe that Government Code § 87401 precludes Mr. Wilmar's representation of Acme.

Apart from § 87401, we also believe that Mr. Wilmar's representation of Acme raises a serious question under Rule 1.11(a) of the American Bar Association's Model Rules of Professional Conduct. That Rule provides:

"Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer and employee unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) The disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule."

BCDC has not consented to Mr. Wilmar's representation of Acme. In construing Rule 1.11(a)'s requirement of "personal and substantial participation," the Court in Securities Investor Protection Corporation v. Vigman, 587 F.Supp. 1358 (C.D. Cal. 1984), rejected the contention of a former SEC regional administrator that his mere signature on a complaint and trial brief reflected only an office formality and not substantial participation in the SEC litigation. 587 F.Supp. at 1366. Instead, the Court found that the signing of such documents alone established personal and substantial participation sufficient to disqualify the former SEC administrator under Rule 1.11(1a).

Rule 1.11(a) is similar to former ABA Disciplinary Rule 9-101(B) which provided that :

"A lawyer shall not accept private employment in a matter in which he had substantial responsibility, while he was a public employee."

Both Rule 1.11(a) and former Disciplinary Rule 9-101(B) are in turn designed to implement Canon 9 of the ABA Code of Professional Responsibility which provides that "A lawyer should avoid even the appearance of impropriety."

The Courts have construed Canon 9 "to require disqualification based on prior employment whenever the former representation is 'substantially related' to the current representation and the current representation is adverse to the former representation." Paul E. Iacono Structural Engineer Inc. v. Humphrey, 722 F.2d 435, 440 (9th Cir.), cert. denied, 104 S.Ct 162 (1983). "A substantial relationship is present 'if the factual contents of the two representations are similar or related' regardless of 'whether confidences were in fact imparted to the lawyer by the client' in the prior representation." Humphrey, supra, Id., (emphasis added), quoting Trone v. Smith, 621 F.2d 994, 998-999 (9th Cir. 1980). Here, we believe there is no question that the current litigation (which arises out of the BCDC consistency proceeding) is "substantially related" to that proceeding, and that Mr. Wilmar's representation of Acme would be adverse to the representation and role that he previously performed for BCDC. We also note that in Humphrey, the "substantial responsibility" requirement of Disciplinary Rule 9-101(B) was satisfied when a former National Labor Relations Board staff attorney had been involved in an NLRB investigation of an unfair labor practice charge, and when the attorney subsequently sought to represent a party in later litigation that grew out of that charge. The Court noted that the lawyer's "personal involvement in the investigation of [the unfair labor practice charge] was both important and material in the work of the NLRB" and that "[t]he facts presented . . . clearly show a violation of Disciplinary Rule 9-101(B)," 722 F.2d at 442.

We also note that Rule 4-101 of the Rules of Professional Conduct of the State Bar of California provides that:

"A member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

To establish a disqualification under Rule 4-101 it need not be shown that a lawyer has, in fact, received and actually



Kathryn Donovan  
April 29, 1985  
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possesses confidential information of the former client. Dill v. Superior Court, 158 Cal.App.3d 301, 304-305 (1984). As stated in Trone v. Smith, supra, 621 F.2d at 999;

"the underlying concern is the possibility or appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought. The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule is intended to protect."

In the circumstances of this case, it is our belief that Mr. Wilmar's representation of Acme would not only be contrary to Government Code § 87401 but would also conflict with the ethical rules of the ABA and California Bar. In expressing this view, we do not question Mr. Wilmar's personal integrity. I have known Mr. Wilmar from the time that he was Executive Director of BCDC and I have the highest opinion of his integrity, honesty and commitment to ethical standards. But we are firmly convinced that Mr. Wilmar's representation of Acme would be inappropriate and highly destructive of administrative processes, internal deliberations and confidences.

We are prepared, if necessary, to seek disqualification of Mr. Wilmar and any present or future attorneys who have not been screened from Mr. Wilmar, before an appropriate court.

We urge you to carefully consider this matter and we thank you for this opportunity to provide our comments.

Very truly yours,

JOHN K. VAN DE KAMP  
Attorney General



Linus Masouredis  
Deputy Attorney General

LM:gr

cc: Michael B. Wilmar  
Alan R. Pendleton w/o enc.  
John T. Knox  
Sanford Skaggs w/o enc.  
Stephen L. Kotska w/o enc.

## SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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SAN FRANCISCO, CALIFORNIA 94102  
PHONE: 557-3686



August 12, 1981

Mr. Scott Miner  
San Francisco District Environmental Branch  
U. S. Army Corps of Engineers  
Department of the Army  
211 Main Street  
San Francisco, California 94105

SUBJECT: Draft Environmental Impact Report for Acme Fill Corporation,  
SCH #81072109

Gentlemen:

We have received your notice regarding the preparation of a draft EIR for the Acme Fill Corporation's project in Martinez, California. On July 24, 1981 the staff wrote to the County of Contra Costa regarding this same project. Our letter to them is appended for your information.

In addition to the comments made to the County we would like to inform you that the Acme Corporation's site, although outside the Commission's jurisdiction is within an area that is designated as water-related industry on Bay Plan Map No. 17. Priority use areas are considered to be part of the "coastal zone" under the Coastal Zone Management Act of 1972 and thus the Commission must find that any project within that area and requiring a federal permit is consistent with the BCDC Plan and policies. The policies on water-related industry and marshes and mudflats are the policies with which this project must be consistent. The staff does not believe that this project is a water-related industry since it does not receive significant benefit from fronting on navigable waters and it does not use water for transportation. Although the Bay Plan policies state interim uses may be placed in water-related priority use areas, it is not clear whether industrial uses could be placed on this fill after the landfill operation is completed.

In addition the staff does not believe that filling of the wetlands on this site would provide a substantial public benefit and there is a reasonable alternative upland location for this project. For these two reasons the staff believes this project may not be consistent with the BCDC management program and that the Commission would have difficulty in finding it consistent.

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Mr. Scott Miner  
August 12, 1981  
Page Two

Since the Corps believes that the project is not water dependent and it would require fill in a wetland, the staff believes that the applicant should demonstrate clearly that there are no alternative sites available for this use. The staff believes that there are sites in Contra Costa County that could be used for this purpose and although they are not controlled by this applicant would be practical for landfill because they could be reasonably obtained and utilized for this use without requiring fill in a wetland. The draft EIR should fully explore alternative sites for this project.

Very truly yours,



MICHAEL B. WILMAR  
Executive Director

Enclosure

MBW/NW/vw

cc: State Clearinghouse  
Robert Batha  
Contra Costa County

00461

## SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

30 VAN NESS AVENUE  
SAN FRANCISCO, CALIFORNIA 94102  
PHONE: 557-3686



August 12, 1981

Mr. Scott Miner  
San Francisco District Environmental Branch  
U. S. Army Corps of Engineers  
Department of the Army  
211 Main Street  
San Francisco, California 94105

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Very truly yours,



MICHAEL B. WILMAR  
Executive Director

Enclosure

MBW/NW/vw

cc: State Clearinghouse  
Robert Batha  
Contra Costa County

00461



September 27, 1982

Mr. Scott Miner  
San Francisco District Engineer  
U. S. Army Corps of Engineers  
Department of the Army  
211 Main Street  
San Francisco, California 94105

SUBJECT: Draft Environmental Impact Report/Statement  
Public Notice No. 13881E59 Acme Landfill Expansion  
BCDC Inquiry File No. MC.MC.7415.10 + 7305.1

Dear Mr. Miner:

The staff has reviewed the public notice and environmental impact report/statement (EIR/EIS) for the Acme Landfill expansion. Although the project will occur on land that is outside the Commission's permit jurisdiction, as noted on page 25 of the EIR/EIS, it is within an area designated water-related industry in the San Francisco Bay Plan. Because the staff believes that the project may affect land and water use within the Commission's jurisdiction, it will require Commission concurrence in a consistency certification under the Coastal Zone Management Act of 1972 prior to issuance of the Corps permit. To date, a consistency certification has not been submitted. Furthermore, from the information in the EIR/EIS and public notice, it is not clear whether a certification can be issued for this project because the use proposed could not be considered a water-related industry.

As you may know, the priority use areas in the Bay Plan were designated in order to reduce future pressure to fill the Bay by reserving especially desirable shoreline sites for uses needing a waterfront location. These uses include water-related industry. If these sites are allowed to be preempted for other purposes, it could eventually mean that fill would be required in the Bay to provide the back up or storage land that is essential to water-related industrial uses.

We note that the draft EIR/EIS states it is doubtful that the large amount of undeveloped area in Contra Costa County designated for water-related industry will be needed for that use in the future. However, the Bay Plan designations stem from a study that identified land use needs to the year 2020, particularly land needed for water-related industry to reduce the need for future fill in the Bay. The EIR/EIS presents no facts to support the contrary opinion regarding land use needs.

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Secondly, no information has been provided in the EIR/EIS that would allow the Commission to determine that this is an interim use and that the site could eventually be used for water-related industry after the sanitary landfill operation is complete. In order for the Commission to make such a determination, it would need engineering data that would assure that it was technically feasible to construct a water-related use on the site and that it would be economically feasible for a water-related use to locate at the Acme site after the fill was completed.

With this letter we are also notifying the applicant that a consistency certification will be needed before the Corps issues a permit and that it is unlikely that the Commission could issue the certification unless the proposed use will not preclude future use of the site for water-related industry.

Very truly yours,

  
MICHAEL B. WILMAR  
Executive Director

MBW/lg

cc: Frank Boerger  
Contra Costa County  
City of Martinez

00304

## SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

30 VAN NESS AVENUE  
SAN FRANCISCO, CALIFORNIA 94102  
PHONE: 357-3686



July 14, 1983

Colonel Edward M. Lee  
District Engineer  
U. S. Army Corps of Engineers  
211 Main Street  
San Francisco, CA 94105

SUBJECT: Final EIR/EIS: Proposed Expansion of ACME Landfill Operations:  
PN13881E59; BCDC Inquiry File No. CC.MZ.8301 and DHB Site No. CC-27

Dear Colonel Lee:

Thank you for sending us the final EIR/EIS for the proposed expansion of the Acme Landfill. The Commission has not had an opportunity to review the document so these are comments of the staff only. Generally, we found complete and accurate information about the project, the site and the expected impacts in the EIR/EIS. However, we had also hoped to find information about the project's consistency or lack thereof with our management program for San Francisco Bay. We had met sometime ago with one of the consultants to the County to explain the consistency certification requirement and the type of information that the Commission would need to evaluate the certification. Apparently, the project sponsor decided to provide that information separately because, for the most part, it does not appear in the final EIS/EIR.

Consistency Certification Needed

The proposed landfill is an activity directly affecting both land and water within the coastal zone as described in the federally-approved management program for the San Francisco Bay segment of the California coastal zone. First, the landfill would occur within an area designated on San Francisco Bay Plan Map No. 17 as a future water-related industrial site. Suitable industrial sites for future needs are limited and the loss of this site may lead to fill in the Bay to provide land for water-related industry. Second, the use of areas near the Bay for landfill forecloses their use for Bay-related activities that need to be on or near the Bay. A sanitary landfill does not need to be in or near the Bay to function. Uses which can function in upland locations should be restricted from areas near the Bay so that the near shoreline will be available for uses that do need to be on or near the Bay. Third, as your report correctly describes, the proposed expansion site consists of marsh diked-off from tidal action that was formerly part of the natural Bay system. Despite the diking, the proposed expansion site still supports typical marsh plants and provides wildlife habitat. The loss of approximately 200 acres of marsh as a result of landfill will further reduce the total marsh habitat available in the Bay Area. Marsh has already

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been substantially reduced by past filling and every effort should be made to protect the remaining marsh. Although the Bay Plan recognizes that marsh areas may need to be filled for water-related industry, to lose marsh for non-water-related purposes is inconsistent with the Plan and the BCDC law as well as adversely affecting the wildlife resources of the Bay.

Since federal approval (the Corps' permit) is needed for the project, the project sponsor must certify that the proposed landfill complies with and will be conducted in a manner consistent with the management program BCDC administers. In this case, the policies and maps of the San Francisco Bay Plan and the provisions of the BCDC law (Government Code Sections 66600 et. seq.) are the relevant part of the program.

#### Difficult to Find Consistency

While only the Commission can decide whether to concur or not with a consistency certification, the staff believes the project poses several issues that make Commission concurrence unlikely. First, the landfill would preempt a water-related industrial site for a non-water-related industrial use. Second, the landfill use does not need to be on or near the Bay and can function well at an upland alternative site. Third, the landfill would destroy an area that now has some wildlife value and that potentially could have substantially greater wildlife value and does not propose suitable offsetting mitigation.

#### A. Preemption of Water-related Industrial Site

The landfill expansion would occur on a site designated in the Bay Plan for water-related industrial use. Landfill is not a water-related industrial use. The Bay Plan states that some industries that use water for transportation gain significant economic benefit from a waterfront location. These are defined as "water-related industries." Other industries may fall into that category because they use large volumes of water or because they provide support for a water-related industry. The Plan states the latter uses should be located in adjacent parcels that do not front on navigable water. The Acme landfill does not need a waterfront location because of transportation nor does it provide support for a water-related industry.

The effective removal of this site from the available inventory of water-related industrial land that would result if the landfill occurred may eventually lead to fill in the Bay to supply land for water-related industry. In this regard, the McAteer-Petris Act, in part, states:

"The Legislature further finds and declares that certain water-oriented land uses along the bay shoreline are essential to the public welfare of the bay area, and that such uses include ports, water-related industries,

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airports, wildlife refuges, water-oriented recreation and public assembly, desalinization plants and powerplants requiring large amounts of water for cooling purposes; that the San Francisco Bay Plan should make provision for adequate suitable locations for all such uses thereby minimizing the necessity for future fill to create new sites for such uses...."

The supply of water-related industrial land is already well below the projected need. The staff recently calculated the supply of land in the Bay area and found that 3909 acres remain. The survey excluded lands that were already developed, that had been removed from the supply by changes to local plans and zoning and that were too steep for development. The 730 acres of land within federal ownership were also excluded because an earlier BCDC study indicated that the land would not be released by the Navy before 2020.

The remaining amount of water-related industrial land is 7,091 acres short of the minimum 11,000 acres of land the Commission determined in 1978 should be reserved exclusively for water-related industry. Even if the need for industrial land declines sharply and the 730 acres within federal ownership are added to the inventory, a shortfall can be expected. ABAG's recently completed study of land needs in the Bay region also identified a shortage of available land in Contra Costa County by the year 2000. Although there is some question about the exact acreage that will be needed for industrial purposes by the year 2020, most other research indicates that there will be a significant shortage. While predictions of land needs may have been too optimistic in the past because they were made during an expanding economy, industrial expansion in Contra Costa County will likely increase, especially as off-shore lease activity increases.

As land supply decreases and industry needs increase, pressure to fill the Bay will increase. Failure to reserve land for industrial purposes now is unwise given the likely need for the land in the future.

Nor does it appear that the landfill can be considered an "interim" use allowable on water-related industrial sites. The San Francisco Bay Plan recognizes that land reserved for water-related industry will be developed over a period of years, therefore other uses may be allowed on reserved sites in the interim. The Commission has frequently approved such interim uses. Because the staff believes that the landfill can be found consistent with the Commission's management program only if it can be properly categorized as an interim use, the staff discussed this aspect of the project with the County's consultant. In this way we hoped to simplify the process, eliminate duplication of paperwork and reduce processing delays.

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The EIR/EIS, however, does not include adequate information to support an interim use classification for the landfill project. For example, one cannot tell whether the site can be used by industry after the landfill operations have been completed. There is little engineering information and no final grading scheme that illustrates how a water-related industry could utilize this site upon closing the landfill. A phasing plan for closure is also needed to indicate when the site could be utilized. Without this information it is difficult to determine the site's future availability for industry.

More importantly, even if the information were provided, staff research indicates that the likelihood of use of a former landfill site by industry in the Bay Area is remote. It may well be too costly to develop a landfill site for industry. In the one or two cases nationally where such sites have been used for industry after a landfill operation, it was necessary to construct large, costly platforms on piling over the fill in order to avoid the impacts of differential settlement and other problems associated with refuse landfills. The only industries that could afford the high construction costs associated with engineering solutions of this sort were located in heavily urbanized eastern cities where land costs were exceedingly high. The northern Contra Costa shoreline does not appear to have similar land costs and may not within the foreseeable future. Information on the costs of site development for industry at the proposed site should be provided so that it can be determined whether it is economically feasible for such an industrial use to occur after closure.

While it is unclear exactly how long the site will be devoted to landfill, the EIR/EIS states that the 200-acre site will have capacity until 2000 or for the next 17 years. This period may be too long to be considered interim in that the site may be needed for industry before that period expires. Additional information about projected industrial needs for land in Contra Costa County should be provided so that the Commission can determine when the site is likely to be needed for industry.

#### C. Landfills Near the Bay Not Consistent with the Bay Plan

The Bay Plan states that some uses of the shore take no advantage of the water as an asset and that some current uses abuse and despoil the water frontage. Policy 10 on page 31 of the Bay Plan states that development that does not use the Bay as an asset should not be allowed. Such development includes refuse disposal operations, unless they are part of an approved fill for a water-oriented use. As the landfill project does not propose any use for the fill other than disposal of refuse, it cannot be considered part of an approved fill.

Moreover, it appears that an alternative upland location exists for the landfill. The EIR/EIS amply discusses the need for a landfill site for eastern Contra Costa County and the difficulties of establishing a new site.

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The County and the landfill operator have expanded a great deal of energy and resources in an effort to provide a cost effective and immediate waste disposal solution for the County citizens. However, development of the preferred site appears to have high environmental costs and the potential to create unemployment of county industrial workers if this 200 acres is lost from the water-related industrial land base. In addition, the EIR/EIS points out that even though this landfill could have capacity until 2000 that another new landfill will be required in the County by 1991. Acme itself has already purchased an option on a site to provide for future County landfill needs. Development of this alternative site, according to the EIR/EIS, will have fewer environmental impacts than expansion of the existing site.

D. Loss of Valuable Existing and Potential Habitat

The project is located in a diked bayland. The Diked Historic Baylands policies are not used for consistency determinations and also do not apply to areas designated for priority use. They are, however, to be used when the staff comments on Corps' Public Notices. Because some information in the EIR/EIS suggests that the site is not now suitable for water-related industrial use, the Corps should be aware of the applicable bayland policies.

If the County believes that the site cannot feasibly be used for industrial purposes, it will be necessary to seek an amendment to the Bay Plan to delete the present water-related industrial designation. However, the staff believes that such a request, unless accompanied by convincing information that the physical characteristics of the site or its location make it impossible to use it for water-related industry, would require a re-examination of water-related industrial sites and needs throughout the Bay Area. Such a planning project would be lengthy, time-consuming and expensive. The Commission would have to approve such a study as part of the planning program and funding would have to be provided as the present budget does not allow for such an extensive study. It should also be noted that the Commission completed a re-examination of this subject in 1978 when new findings and policies were adopted for water-related industry. At the time of the hearings on that study the County did not object to the designation of the present site for water-related industrial uses. For these reasons the Commission may be reluctant to undertake a new study of this matter in the near future. Assuming that such a study were done and the site was deleted from the industrial land inventory for the Bay Area, the Diked Historic Baylands policies would require further modification of the proposed landfill project.

The project would displace 200 acres of diked seasonal wetland. This type of habitat was found by the Commission in its study of diked historic bayland to be of particular value to the Bay migratory waterfowl and shorebirds. Birds take refuge in bayland sites such as this during high tides and storms. This site is also near to the tidal marshes of San Pablo Bay providing a juxtaposition of habitats that is essential to migratory waterfowl and shorebirds. Loss of the 200-acre site will reduce the area of wetlands that surround the Bay by a fairly large amount and it is possible that the populations of migratory birds could suffer as a result.

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This site not only has existing habitat value but also has excellent potential for enhancement. It could be managed as a brackish marsh or returned to tidal action. The former can provide high value habitat for migratory species while the latter can increase the Bay surface area and provide food for Bay species. Either scheme can be integrated into a project that will provide additional flood control benefits for the County.

In addition, the Baylands policies state that if fill is placed that all wildlife values lost should be fully mitigated by acquisition, restoration, preservation and dedication of non-wetlands or suitable diked historic baylands or marshes or mudflats. A mitigation site of at least the acreage to be filled may be necessary in order to fully offset the loss of habitat, and it is possible that a larger site might be necessary if the habitat value of the site is determined to be extremely high by the relevant fish and wildlife agencies. The EIR/EIS does not indicate that the project sponsor is committed to a mitigation project that satisfies this policy.

#### Conclusion

The EIR/EIS carefully and fully discusses the environmental effects of expanding the landfill into the proposed site. We believe the document meets the requirements of the California Environmental Quality Act and the National Environmental Policy Act. The included information, however, suggests that the expansion will have unavoidable adverse impacts and involves a use that does not need to be near the Bay. While the document includes much information that the Commission will need when the consistency certification is submitted, certain information is lacking as discussed above. We had hoped that this information would be included in the document to save the project sponsor, the County and the Corps the need of preparing separate consistency information.

We note that a consistency certification has not been submitted by the project sponsor and remind the concerned agencies and the company that one must be submitted and acted upon by the Commission before a Corps' permit may be issued.

If you have further questions regarding this matter, please contact Alan R. Pendleton, the Executive Director-designate of the Commission.

Sincerely,



MICHAEL B. WILMAR  
Executive Director

MBW/st

cc: Anthony Dehaesus, Contra Costa County  
Acme Landfill Company  
Dale Sanders, City of Martinez  
Bill Brah, Office of Coastal Resource Management  
Tom Powers, Supervisor Contra Costa County  
Angelo Siracusa, Bay Area Council

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